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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1962

No. 431

ARVIL R. HARNCASTLE, VERNON E. CLARY, LAWRENCE J. STARKEL, JAMES H. KREIDER, ROBERT D. MOCK, on their own behalf and on behalf of others similarly situated,

Petitioners,

vs.

WESTERN GREYHOUND LINES (DIVISION OF THE GREYHOUND CORPORATION), a corporation, D. L. RHODES, as an individual in a representative capacity, J. ADORNETTO, as an individual in a representative capacity, DAN BANTA, as an individual in a representative capacity,

Respondents.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

Petitioners, on their own behalf and on behalf of a class of others similarly situated, respectfully pray

that a Writ of Certiorari issue out of, and under the seal of this Court to review the decision and judgment of the United States Court of Appeals for the Ninth Circuit (attached hereto and marked "Appendix A") affirming the Order of the United States District Court for the Northern District of California, Southern Division (attached hereto and marked "Appendix B").

I

OPINIONS BELOW

The opinion of the District Court is contained in its Order Granting Motion to Dismiss (Appendix B). The opinion of the Court of Appeals for the Ninth Circuit is reported at 303 F.2d 182 (attached hereto and marked "Appendix C").

II

JURISDICTION

The jurisdiction of this Court to review by Writ of Certiorari the judgment complained of is conferred by Title 28, U.S. Code, Sec. 1254(1). The jurisdiction of the Court of Appeals was conferred by Title 28, U.S. Code, Sec. 1291, and of the District Court by Title 28, U.S. Code, Sec. 1337 and Title 29, U.S. Code, Sec. 157-9.

The Judgment of the United States Court of Appeals for the Ninth Circuit here sought to be reviewed was entered on May 16, 1962. A petition for rehearing

was filed by the petitioners on June 8, 1962, and was denied by the Court of Appeals on June 18, 1962.

III

QUESTION PRESENTED FOR REVIEW

Are the petitioners, a group of individual union members, to be denied a trial on the merits of their claim of hostile discrimination by their union and employer in the light of their complaint, the facts presented to the District Court and a decision of the California State Public Utilities Commission, of which the Court can take judicial notice?

IV

STATEMENT OF THE CASE

Petitioners and the class which they represent (hereafter referred to as "Aggrieved Employees"), are all motor coach operators, employees of respondent Western Greyhound Lines (Division of the Greyhound Corporation) (hereafter referred to as "Greyhound"). The special characteristic of the class is that all of the Aggrieved Employees have seniority dates with Greyhound between June 1, 1957, and May 28, 1959. The Aggrieved Employees, as of May 28, 1959, numbered about 250 out of approximately 3,000 motor coach operators employed by Greyhound.

Greyhound is an interstate carrier of passengers by motor coach. The total Greyhound system covers

eleven Western States but operations are divided into some eleven divisions or their equivalents, and it is into a division that operators are hired. Under normal circumstances, operators stay in one division so long as there is work available.

The employees of Greyhound are represented for collective bargaining by one of seven local unions of the Amalgamated Association of Street Electric Railway and Motor Coach Employees of America. These seven locals together make up the Council of Western Greyhound Amalgamated Divisions (hereafter referred to as "Council"). The three individual respondents are representatives of the Council.

Under collective bargaining agreements, the Aggrieved Employees, who joined Greyhound between June 1, 1957 and May 28, 1959, acquired Divisional seniority rights. (Record, Stipulation to Facts, Exhibits B and E.) The significance of Divisional seniority is that an operator holding such seniority has bidding rights and rights to jobs in that Division superior to any employees of Greyhound except those in the Division with earlier seniority dates. The fewer the men "above him" on the Divisional seniority roster, the better the choice of runs and the surer the individual is of year-round work.

On May 28, 1959, Greyhound and the Council entered into a Stipulation Agreement (Record, Complaint, Exhibit A) which affected Divisional seniority. The Agreement protected Divisional seniority for all those with seniority dates prior to June 1, 1957. It created system seniority (i.e., no secured rights in

any one division) for all those hired after June 1, 1957. Those hired into the company after May 28, 1959 had notice of the existence of system seniority on entering employment. For those with seniority dates between June 1, 1957 and May 28, 1959 (the Aggrieved Employees), however, the stipulation effected a retroactive change in their seniority rights.

The damage suffered arises from the change from Divisional to system seniority. Under the Stipulation Agreement of May 28, 1959, the Aggrieved Employees, who, prior to May 28, 1959, had security in their Division, now faced the danger of having men from other Divisions move above them on the Divisional seniority roster. With a lower position on the seniority roster, they faced a consequent poorer choice of runs, temporary furlough, or even being forced to move to another Division. This could require selling home, moving children from school, and disrupting the family. The operation of seniority systems is such that the effect on any one individual is unpredictable as individuals exercise their choice based on the changed system.

The effective date of system seniority was one part of the Stipulation Agreement which contained also provisions relating to a merger of Divisions 4, 5 and 6 of the system and other prior mergers. (Record, Complaint, Exhibit A, Sections 1(b), 2, 3.) The Stipulation Agreement was submitted to the membership of all the Amalgamated Divisions with a ballot that permitted only a yes-or-no vote on the entire Agreement. (Record, "Official Ballot", Ex-

hibit A submitted to District Court.) The explanatory letter that accompanied the ballot (Record, Exhibit B, submitted to the District Court) and on which the vote was based, stated, contrary to the facts, that there would be *no* loss of Divisional seniority.

It stated:

P. 1 (5 paragraphs from bottom):

> "The Council further stated that the identity and Division seniority rights built up over the years by members of the various divisions should and would be preserved intact."

P. 1 (2nd paragraph from bottom):

> "The first principle of the proposal is the preservation of Divisional seniority. *Every member* maintains and accumulates his seniority rights in his home Division in the same manner as at present." (Emphasis supplied.)

P. 2 (3rd full paragraph):

> ". . . Thus, the preferential seniority status of every member in his own division is preserved and he also obtains a degree of protection against furlough after he has accumulated many years of service which he may exercise to displace *new hires* in other portions of the Company." (Emphasis supplied.).

With these contradictory statements, the Stipulation Agreement was approved by the needed majority and became effective.

Although not put forward at the time of the Stipulation Agreement, in argument before the District

Court and the Court of Appeals it was alleged that June 1, 1957 was selected for the beginning of system seniority because that was the formal date of the corporate reorganization which led to the creation of Greyhound out of a number of bus systems which had before that operated under separate names.

That the corporate reorganization did not in fact affect the seniority operations is suggested by one of the aspects of the change. Prior to June 1, 1957, Pacific Greyhound lines and the Greyhound Corporation applied to the Public Utilities Commission of the State of California for approval of the proposed corporate reorganization. The Public Utilities Commission's approval was granted in Decision No. 54875, dated April 22, 1957. (A copy of a certified copy of this decision, of which this Court is asked to take judicial notice, is attached hereto as Appendix D.) The Commission's approval was based on the parties' representations that the corporate reorganization would lead to no operational changes, and would use the same personnel under the then existing rules and regulations. (Appendix D, p. xx.)

In addition to the representations made prior to June 1, 1957, in other changes in seniority arrangements, Greyhound and the Council have not established a change retroactive to June 1, 1957. For example, in the Stipulation of January 23, 1959 (Record, Stipulation to facts, Exhibit C) the first change did not become effective until March 1, 1959, *prospectively*. This Stipulation, affecting Divisions 2 and 3, was not disturbed by the Stipulation Agreement of May 28, 1959.

The gravamen of the petitioners' case, and of the claim alleged in the Complaint, is that setting June 1, 1957 as the effective date of system seniority in the Stipulation Agreement of May 28, 1959 was "hostile discrimination" directed against the Aggrieved Employees. The Complaint alleges (Record, Complaint, p. 4) that said contract "arbitrarily, unfairly and capriciously" took away the Aggrieved Employees' vested Division seniority rights. The Complaint further alleges that:

> "The Aggrieved Employees were singled out and discriminated against by being deprived of vested Divisional seniority, while all other employees' seniority rights were not affected in any way." (Paragraph IX.)

The Complaint further alleges that "By reason of the unfair, arbitrary, capricious discrimination and unreasonable contract provisions . . . the Aggrieved Employees (were) damaged . . ." (Record, Complaint, Paragraph X, p. 4.) The Complaint prays for a declaratory judgment declaring the discriminatory part of the May 28, 1959 agreement void, and for injunctive relief. Both Greyhound and the Council filed answers to the Complaint.

On April 6, 1962, the Council made a Motion to Dismiss the Complaint and was heard as a preliminary to the trial. The language of the Complaint, the circumstances surrounding the balloting on the Stipulation, and the ostensible rather than real basis for the June 1, 1957 date were urged in opposition to the Motion to Dismiss.

On May 11, 1962 the District Court granted the Council's motion to dismiss the Complaint (Appendix B), basing its decision on the distinction made in *Colbert v. Brotherhood of Railroad Trainmen,* (9th Cir., 1953) 206 F.2d 9, 13, between discrimination that is inimical to statutory or constitutional right, such as racial discrimination, and the discrimination claimed in this suit. (Appendix B, p. v.) Under Rule 12(b) of the Federal Rules of Civil Procedure, the Court's decision is taken as a summary judgment.

The Order was appealed, and the Court of Appeals held that hostile discrimination of *any* kind is prohibited, and the prohibition is not limited to discrimination on account of race. The Court affirmed the District Court's Order, however, stating that the Complaint and facts do not allege or support any improper motive or purposeful discrimination and that there is no genuine issue as to any material fact.

V

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

The Court below has felicitously clarified the law by deciding that hostile discrimination *of any kind* by a union is prohibited, and that discrimination is not limited to discrimination on account of race. (Appendix C, p. x.) In this, the Court followed *Ford Motor Co. v. Huffman* (1953) 345 U.S. 330, 73 S. Ct. 681, *Ferro v. Railway Express Agency, Inc.* (2d Cir., 1961) 296 F. 2d 847, *Mount v. Brotherhood*

of Locomotive Engineers (6th Cir., 1955) 226 F. 2d 604. Petitioners have no quarrel with this proposition.

The Court below erred, however, in deciding that no genuine issue of hostile discrimination is raised by petitioners' pleadings and evidence presented to the District Court. The Court below's analysis of petitioner's pleading is contrary to and in conflict with this Court's views expressed in *Conley v. Gibson* (1957) 355 U.S. 42, 78 S. Ct. 99. In this case the liberal notice pleading of the Federal Rules was reaffirmed. This Court rejected the approach to pleading as a game of skill in which one misstep by counsel could be decisive of the outcome, and accepted the principle that the purpose of pleading is to facilitate a proper decision on the merits.

The decision of the Court below is also in conflict with the Second Circuit's decision in *Ferro v. Railway Express Agency* (1961) 296 F. 2d 847, the Sixth Circuit's decision in *McHenry v. Ford Motor Co.* (1959) 269 F. 2d 18, and the Third Circuit's *Toebelman v. Missouri-Kansas Pipe Line Co.* (1942) 130 F. 2d 1016. These cases put on the party moving for a summary judgment the burden of proving that no genuine factual issues exist. They hold that all doubts are resolved *against* the party moving for a summary judgment and all favorable inferences drawn from the evidence go to the benefit of the party opposing the summary judgment. The Court's function, these cases and many others hold (see 6 Moore's *Federal Practice*, 2106 et seq.), is not to decide issues of fact but to determine whether there are issues of fact to decide.

Petitioners urge that the following two factual issues are raised by the pleading and evidence:

—did respondents act "hostilely", that is, with bad faith in discriminating against petitioners?

—is there a real basis or only an ostensible basis for the selection of June 1, 1957, as the effective date for commencing system seniority?

Under the guise of deciding that no genuine issues of fact exist, the Court below has, really, decided those two issues of fact on the scant evidence before it. The practical effect of this decision is to deny to the petitioners a trial of their claim of discrimination. It is this consequence which the Court should prevent.

Petitioners do not urge now or at any time a limitation on the freedom of a bargaining agent to negotiate an agreement which affects individual members differently. (*Ford Motor Co. v. Huffman* (1953), 345 U.S. 330, 78 S. Ct. 681.) The bargaining agent must do this, however, without hostility to any. (*Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 198-9, 65 S. Ct. 226, *Ford Motor Co. v. Huffman*, supra.) Ultimately, if petitioners are to prevail at a trial, they will have to prove the hostility and bad faith of the respondents. They ask only the chance to go to trial.

VI

ARGUMENT

PETITIONERS' COMPLAINT STATES A SUFFICIENT CLAIM OF HOSTILE DISCRIMINATION TO GIVE NOTICE OF ISSUE TO RESPONDENTS

The Court below failed to find in the Complaint any allegations that selecting June 1, 1957 as the date of adopting system seniority was the result of hostile discrimination against the appellants. (Appendix C, p. xiii.) They found this in spite of the allegation of Paragraph IX of the Complaint:

> "The Aggrieved Employees were singled out and discriminated against by being deprived of vested Divisional seniority, while all other employees' seniority rights were not affected in any way."
> (Record, Complaint, p. 4.)

To "single out and discriminate" implies hostility, and the lack of relevant differences as a basis for differential treatment, which was disapproved by this Court in the *Steele v. Louisville & N. R. Co.* case (supra). Webster's Third New International Dictionary (unabridged, 1961) defines the verb "discriminate":

> "To make a difference in treatment or favor on a class or categorical basis in disregard of individual merit."

With nothing more, the language of the complaint implies the hostility and bad faith required to state a claim. The common usage of the term "discrimination", as in racial discrimination, connotes the deliberate differentiation not based on rational bases which

this Court found renders a bargaining agent subject to an action in the *Steele* case and in *Ford Motor Co. v. Huffman.*

In *Ferro v. Railway Express Agency* (2d Cir. 1961) 296 F. 2d 847, the complaint stated "that defendants have in a willful and malicious manner discriminated against plaintiff in favor of members of Lodge 2147 of the Brotherhood". This language was held sufficient to entitle the plaintiff to a trial on the merits, citing *Conley v. Gibson* (1957) 355 U.S. 931, 78 S. Ct. 99, as a standard of the requirements of Federal pleading. There is no essential difference between the language of the Complaint in the instant case and in the *Ferro* case in giving respondents notice of the claim.

THE EVIDENCE BEFORE THE DISTRICT COURT, GIVING IT ALL INFERENCES FAVORING PETITIONERS, DOES NOT SUPPORT RESPONDENT'S BURDEN OF SHOWING THAT NO GENUINE ISSUES OF MATERIAL FACT EXIST

The District Court went beyond the pleadings in considering respondents' Motion to Dismiss. It considered the Stipulation of Facts signed by all the parties, two exhibits submitted by petitioners, and a further oral stipulation. There was extensive argument by counsel for all the parties. In the course of argument, a colloquy took place between the Court and one of the attorneys for petitioners which has been labelled an "Offer of Proof" and included in the record.

As a statement of what petitioner's trial position would be, this "offer of proof" indicates on its face that it is not complete. The colloquy indicates (Record, Stipulation Re Record on Appeal, p. 3) that Mr. Darwin, one of petitioners' attorneys left it to Mr. Leff, the other of petitioners' attorneys, to complete the Statement of petitioners' trial position. In fact, the Court did not give petitioners' other counsel a chance to speak. To the extent that the "offer of proof" is a statement which binds—or "hangs"—petitioners, it is clearly not a complete statement of their position, and it is erroneous and unfair to hold the lack of any particular statement in this colloquy against the petitioners, as was done by the Court below.

The Court below decided that the record before the Court established only a difference of opinion between portions of the Union membership, and no improper motive or purposeful discrimination. (Appendix C, pp. xiv-xv.) They could decide this only by *deciding* the factual issues rather than deciding that such factual issues exist.

For example, the exhibits submitted to the District Court, the Ballot and the Communication accompanying the Ballot (Record, Exhibits A and B submitted to the District Court), indicate that the issue of the effective date of the change to system seniority was never put to the membership since the ballot had only a yes-or-no choice on accepting the entire Stipulation. Moreover, as was discussed above (pp. 5-6), the Communication as to the Ballot contained Statements that no present member (including the Aggrieved

Employees) would lose Divisional seniority. This was plainly not so. The inference may reasonably be drawn from this that the date of the change in seniority from Divisional to System was concealed, or at least an attempt was made to conceal it. This hardly shows good faith. The Court below did not even mention these exhibits in its opinion.

The Court below found a rational basis for June 1, 1957 as the date for system seniority "amply demonstrated" in the record. (Appendix C, p. xvi.) They found the corporate reorganization which established Greyhound as of June 1, 1957 as the rational basis. Petitioners submit that this was an ostensible rather than real change, in so far as its effect on employees is concerned. To find this a sufficient rational basis is again deciding the factual issue rather than recognizing the existence of an issue on which petitioners should be permitted to go to trial.

Pacific Greyhound lines and Greyhound Corporation, the predecessor organizations to Greyhound in California, have themselves represented that the corporate reorganization that led to the formation of Greyhound would lead to no changes in operations, personnel or rules and regulations. Based on these representations, the Public Utilities Commission of the State of California approved the corporate reorganization in Decision No. 51875, dated April 22, 1957. (Appendix D, p. xx.) Petitioners respectfully ask this Court to take judicial notice of the certified copy of this decision attached hereto as Appendix D.

This decision, and the representations on which it was based, when given any inference but the one most favorable to respondents, raises serious question as to the operational in contrast to corporate structural significance of June 1, 1957. It does not resolve, but it certainly raises an issue which requires a trial to settle. In other Agreements on seniority, for example, the Stipulation of January 23, 1959 (Record, Stipulations to Facts, Exhibit C), the effective change in seniority was prospective rather than retroactive, and nothing hinged on the June 1, 1957 date.

Consideration of the full evidence at a trial on the merits could well show that there was no improper motive nor purposeful discrimination by Respondents. Petitioners could have no grounds for complaint at that point. Until the evidence is presented, however, they will have been denied their day in court.

There have been many, many expressions of the need for judicial restraint in granting a Summary judgment. Petitioners urge that restraint is particularly appropriate where, as here, individual union members are challenging their union, claiming hostile discrimination. The danger of a denial of a trial on the merits should outweigh the possible danger of a trial which may ultimately prove to have been unnecessary.

Giving the petitioners the benefit of the doubt, imposing the burden on respondents of showing no genuine issues of fact, interpreting the pleading liberally and viewing the evidence with inferences favorable to the petitioners—all principles firmly estab-

lished in many cases—can lead only to the conclusion that the Court below was in error in affirming the summary judgment in respondent's favor.

VII

CONCLUSION

For the reasons given above, this petition for a Writ of Certiorari should be granted, the Judgment below should be reversed, and the case should be remanded to the District Court for trial.

Dated, San Francisco, California,
September 12, 1962.

Respectfully submitted,
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(Appendices Follow.)